Was there a dispute?

The final issue before me was whether there was any dispute or difference between the parties that was referable first to the architect for decision, and absent his decision, referable to arbitration. The defendants in one of their letters to the plaintiffs denied that there was any dispute and that further as they had terminated the plaintiffs' employment, there was nothing which could be referred to the architect or to arbitration. Counsel for the plaintiffs submitted that this objection was untenable on the facts and the law. I agreed. There were a great number of disputes of fact between the parties arising out of and in connection with the project. They were set out in great detail in the plaintiffs' letter dated 17 February 1987. Furthermore, whether or not the defendants were entitled to terminate the employment of the plaintiffs was itself an arbitrable issue: *Heyman* v *Darwins*.[3] The architect decided not to decide any of the disputes raised by the plaintiffs and suggested that they be referred to arbitration.

For the above reasons, I was satisfied that this court had jurisdiction to hear the action, that the award was valid and the plaintiffs were entitled to enforce the award against the defendants as a judgment or order to the same effect pursuant to s 20 of the Arbitration Act (Cap 10, 1985 Ed).

Application allowed.

Solicitors: *Goh Poh & Partners.*

Reported by *Liu Hern Kuan*

Tan Chor Thing v Tokyo Investment Pte Ltd & Anor

HIGH COURT (SINGAPORE) — SUIT NO 1844 OF 1989
CHAN SEK KEONG J
20 FEBRUARY 1991

Contract — Illegal contract — Contract prohibited by statute — Effect of such contracts — General principle — Effect of securities based on the illegal contract

Commodities and Futures Trading — Futures trading — Futures Trading Act (Cap 116, 1985 Ed) — Construction of Act — Effect of Act — Acts prohibited under the Act

The plaintiff was the owner of some 290,000 shares in various companies listed on the Singapore Stock Exchange. The defendant ('Tokyo Investment') was the representative of the second defendant, Tokyo Commodity Ltd ('Tokyo Commodity'). The plaintiff had originally pledged the shares with Heritage Commodities as security for his trading account with them. However, he had closed his trading account with Heritage. The shares then came into the custody of Tokyo Investment. Tokyo Commodity claimed that the plaintiff had allowed his brother TCK to deliver the shares to Tokyo Investment to hold on behalf of Tokyo Commodity as security for TCK's trading account with them.

These shares were eventually seized by CID in connection with investigations into the activities of Tokyo Investment for infringement of the Futures Trading Act (Cap 116, 1985 Ed) ('the Act'). On application by the plaintiff, the assistant registrar has ruled that the plaintiff was entitled to possession of the shares. The defendants appealed against this decision.

The plaintiff claimed the return of the shares on the basis that the pledge was illegal as the underlying transactions were illegal under the Act. The defendants claimed that the transactions were legal as they were effected in Hong Kong. Tokyo Investment took orders from TCK and placed them with Tokyo Commodity in Hong Kong as TCK's agents. Further, Tokyo Commodity were not aware that it was illegal for Tokyo Investment to carry on the business of futures trading in Singapore without a licence.

Held, dismissing the appeal:

(1) Tokyo Investment had acted as the agents of Tokyo Commodity and had carried on, illegally, the business of futures brokers in Singapore.

(2) With respect to the issue of the legality of the transactions, the general principle of law is to determine whether the statute means to prohibit the contract. This is a question of construction of the statute.

(3) The Act was clearly intended to regulate the carrying on of futures trading business in Singapore and to protect the public from dealing with unlicensed brokers in respect of futures in any unauthorized futures exchange within or outside Singapore. It clearly prohibits an unlicensed broker from entering into a brokerage contract for futures.

(4) Tokyo Commodity were carrying on the business of a futures broker in Singapore without a licence through Tokyo Investment. Accordingly, the contracts which they had put through for TCK in Singapore were all illegal and all moneys due thereunder were irrecoverable.

(5) The plaintiff was in the position of a guarantor of the liabilities of TCK, the consideration being that the Tokyo Commodity would carry out the buying and selling orders of TCK. This must imply the carrying out of lawful and not unlawful orders. Accordingly there was no consideration for the security and the shares must be returned.

(6) It was the object of the Act to protect the public who trade in futures. As there was no allegation that the plaintiff was in pari delicto, he was entitled to recover the shares.

(7) An unlicensed broker is prohibited from taking securities in connection with the buying and selling of futures. They were therefore not entitled to retain the shares.

[*Editorial Note:* The defendants have appealed to the Court of Appeal vide Civil Appeal No 28 of 1991.]

Cases referred to

1 *Hollington* v *Hewthorn* [1943] 2 All ER 35 (refd)
2 *Smith* v *Lindo* (1858) 141 ER 237 (distd)
3 *Yango Pastoral Co Pty Ltd* v *First Chicago Australia Ltd* (1978) 53 ALJR 1; (1978) 21 ALR 585 (folld)
4 *St John Shipping Corp* v *Joseph Rank Ltd* [1957] 1 QB 267; [1956] 3 All ER 683 (folld)
5 *Cope* v *Rowlands* (1836) 150 ER 707 (refd)
6 *Kiriri Cotton Co Ltd* v *Dewani* [1960] AC 192; [1960] 1 All ER 177 (folld)

Legislation referred to

Futures Trading Act (Cap 116, 1985 Ed) ss 2, 11(1)(a), 14, 22, 24

Kenneth Tan for the plaintiff/respondent.
Choo Han Teck for the defendant/appellant.

Cur Adv Vult

Chan Sek Keong J: This is an appeal by the defendants against the decision of the assistant registrar that the plaintiff was entitled to possession of 290,000 shares ('the shares') of seven Malaysian companies which were listed on the Stock Exchange of Singapore, damages and costs.

The plaintiff was the owner of the shares. At the date of commencement of this action, the share certificates were in possession of the Criminal Investigation Department ('the CID'), they having been seized by the CID in the course of investigating the activities of the first defendants in November 1987. Following the investigation, the first defendants were charged under s 11(1)(d) of the Futures Trading Act (Cap 116, 1985 Ed) ('the Act') for having, between 7 October 1987 to 26 October 1987, carried on the business of trading in the Hang Seng Index futures ('HSI futures') without a licence. The first defendants pleaded guilty and were fined. In the statement of facts tendered to the court, the first defendants admitted that they had acted as a futures broker representative of the second defendants, a Hong Kong company, and was paid a service fee of $20,000 a month.

After the criminal proceedings, the plaintiff made a claim for the return of the shares. However, the CID was not prepared to deliver the shares to the plaintiff as the second defendants had also claimed that they were the 'equitable owners' of the shares and were entitled to retain them as security for the trading account of the plaintiff's brother, TCK, with them in connection with dealings in HSI futures.

The second defendants' claim arose in the following circumstances. On 27 July 1987, the plaintiff entered into a trading agreement with a company called Heritage Commodities Pte Ltd ('Heritage') to trade in Japanese red beans. On or about 3 September 1987, the plaintiff pledged the shares with Heritage as security for his trading account. The person in Heritage who managed the plaintiff's account was one SLWL, a director of Heritage.

The plaintiff's version of the subsequent events as deposed in the affidavits filed by him was as follows: he instructed Heritage on 20 October 1987 to close his trading account, settle the amount due to the plaintiff and also return the shares; Heritage closed the account but did not pay him until 2 November 1987 when he was paid $100,404.40 being the amount due to him. He also signed an acknowledgment dated 2 November 1987 in which he certified that he had 'no further claim or what-so-ever' against Heritage on the account. He alleged that the shares were not returned to him.

The second defendants' version of how they came to take possession of the shares from Heritage as deposed in the affidavits filed by them was as follows: On 20 October 1987 when the plaintiff stopped trading with Heritage, he allowed TCK to deliver the shares to SLWL as a director of the first defendants to hold for the second defendants by way of security for TCK's trading account with the second defendants; that the plaintiff had signed a receipt for the shares (which the second defendants admitted they could not produce); and that he closed his account later on 2 November 1987. The second defendants produced in evidence the following documents signed by TCK with or in favour of the second defendants: (a) a customer's agreement dated 15 October 1987, (b) a pledge agreement dated 20 October 1987 in which the second defendants acknowledged receipt of the shares, and (c) a list of the shares. Both the customer's agreement and the pledge agreement were signed by SLWL on behalf of the second defendants. Since SLWL was not an officer or attorney of the second defendants, he could only have signed the documents as a director of the first defendants.

TCK, whose evidence would have had a material bearing on the truth of the conflicting allegations of the plaintiff and of SLWL, did not file any affidavit in this action, nor was he made a party to these proceedings. However, it has to be pointed out that although the

plaintiff claimed that the shares were not returned to him after the settlement of his account with Heritage, he did not allege that he had made any written or oral demand for the return of the shares after 2 November 1987. He has not given any explanation for allowing his shares to be in the possession of the first defendants until they were seized by the CID.

In the circumstances, counsel for the plaintiff had to concede that there was a triable issue on whether his client had consented to TCK pledging his shares to the second defendants. However, he contended that the pledge was illegal as the underlying transactions were illegal by virtue of s 11(1)(a) of the Act, and that the shares were recoverable from the second defendants.

Counsel for the defendants submitted that the pledge was legal as it secured transactions which were legal. He contended that firstly, TCK's dealings with the second defendants were effected in Hong Kong and not in Singapore, that although the first defendants had taken orders from TCK and placed them with the second defendants in Hong Kong, they did so as agents of TCK. He said that the second defendants were not TCK's brokers but the first defendants were TCK's brokers. In this respect, he contended that the admission of the first defendants that they had acted as agents of the second defendants was not admissible against his clients under the rule in *Hollington* v *Hewthorn*.[1] It was contended, secondly, that in any case the shares were not recoverable as the second defendants were not aware that it was illegal for the first defendants to carry on the business of futures trading in Singapore without a licence. Counsel referred to the decision of the Exchequer Chamber in *Smith* v *Lindo*[2] where the court had held that although an unlicensed broker in London could not sue for his commission by reason of s 5 of 6 Ann c 16, he could recover money which he had paid on behalf of his client for bought shares. He also referred to *Yango Pastoral Co Pty Ltd* v *First Chicago Australia Ltd*[3] where the Australian High Court held that the respondents, an unlicensed bank, which had made a secured loan to the appellants were entitled to recover the loan.

So far as the facts were concerned, I found on the evidence that the first defendants acted as the agents of the second defendants in carrying on the business of futures trading in Singapore. There was in evidence an admission by the second defendants that the first defendants were their service agents in Singapore. This admission would not be sufficient to prove that the first defendants were trading in HSI futures in Singapore as the agents of the second defendants. However, there was also in evidence copies of the second defendants' printed buying and selling order forms duly signed by SLWL in Singapore with respect to TCK's transactions with the second defendants. These documents in my view were sufficient to prove that SLWL, whether as a director of the first defendants, was taking buying and selling orders from TCK as agent of the second defendants. These documents also showed the executed prices of the orders. Accordingly, these orders could not have been sent to Hong Kong for execution, but were probably executed by telephone or some other form of instant communication. Even if the orders had been executed in Hong Kong, they were solicited or accepted by the first defendants in Singapore. The first defendants' plea of guilty was admissible to prove that the first defendants had carried on, illegally, the business of futures broker in Singapore. The said documents proved that they were carrying on such business as agents of the second defendants. It was not necessary for the plaintiff to rely on the admission of the first defendants in the criminal proceedings to prove the fact of agency against the second defendants.

With respect to the issue of the legality of the transactions, the general principle of law is not in doubt. In *St John Shipping Corp* v *Joseph Rank Ltd*,[4] Devlin J said (at p 287): 'The fundamental question is whether the statute means to prohibit the contract. The statute is to be construed in the ordinary way: one must have regard to all relevant considerations and no single consideration, however, important, is conclusive.' In the *Yango Pastoral* case,[3] Gibbs ACJ said (at p 2):

> There are four main ways in which the enforceability of a contract may be affected by a statutory provision which renders particular conduct unlawful: (1) The contract may be to do something which the statute forbids; (2) The contract may be one which the statute expressly or impliedly prohibits; (3) The contract, although lawful on its face, may be made in order to effect a purpose which the statute renders unlawful; or (4) The contract, although lawful according to its own terms, may be performed in a manner which the statute prohibits.

The High Court of Australia held that s 8 of the Banking Act 1959 (Commonwealth) which provided that no body corporate should carry on banking business unless it had a banking licence did not vitiate loans made by an unlicensed bank, having regard to the scope and object of the relevant provisions of the Act, and in particular to the heavy penalty imposed by that section (A$10,000 per day) on the corporate body. The court held that s 8 did not expressly prohibit an unlicensed bank from making a contract of loan nor could the prohibition be implied therefrom as the contracts that might be entered into in the course of banking business were so varied and not necessarily distinctive of the business. The decision of *Yango Pastoral*'s case[3] was based on the construction of the relevant statute.

Smith v *Lindo*[2] was, in my view, of no assistance to the defendants. In that case, the broker sued to recover money which he had paid on the client's behalf in the course of his employment of broker for shares which the broker had bought. The court held that although the

statute forbade an unlicensed broker from claiming his commission, there was nothing illegal in his paying for shares which the client had impliedly authorized him to pay, and further, there was no duty on the part of the broker to pay for the shares.

On the other hand, in *Cope* v *Rowlands*,[5] Parke B held that 6 Anne c 16 impliedly prohibited a brokerage contract entered into by an unauthorized person and rendered it illegal and void. At p 710, Parke B said:

> And it may be safely laid down, notwithstanding some dicta to the contrary, that if the contract be rendered illegal, it can make no difference in point of law whether the statute which makes it so has in view the protection of revenue, or any other object. The sole question is whether the statute means to prohibit the contract ... the question for us now to determine is, whether the enactment of the statute 6 Ann c 16 ... is meant merely to secure a revenue to the city, and for that purpose to render the person acting as a broker liable to pay a penalty if he does not pay it? or whether one of its objects is the protection of the public, and the prevention of improper persons acting as brokers. On the former supposition, the contract with the broker is not prohibited by the statute; on the latter it is: for it cannot be permitted to a person to recover a compensation for an act which the law interdicts him from doing.

In the *Yango Pastoral* case,[3] Mason J explained that the above passage was not applicable for the purpose of construing the object of s 8 of the Banking Act on the ground that brokerage contracts were distinctive of brokerage contracts, whereas a mortgage loan was not necessarily distinctive of banking business which was varied in character.

So far as the Act is concerned, I was of the view that it clearly intended to regulate the carrying on of futures trading business in Singapore and to protect the public from dealing with unlicensed brokers in respect of futures in any unauthorized futures exchange within or outside Singapore. The expression 'futures broker' is defined in s 2 of the Act as follows:

> a person whether as principal or agent who carries on the business of soliciting, or accepting orders, for the purchase or sale of any commodity under a futures contract on any Exchange or futures market and, who in connection therewith, accept any money, securities or property (or extends credit in lieu thereof) to margin, guarantee or secure any trades or contracts that may result therefrom whether or not the business is part of, or is carried on in conjunction with, any other business.

The expression 'Exchange' is defined as follows:

> (a) the Singapore International Monetary Exchange Ltd; or
> (b) a body corporate —
>
> (i) that provides or proposes to provide the physical facilities necessary for trading in futures contracts; and
> (ii) that maintains or proposes to maintain a futures market that is approved by the Authority under section 4.

Section 11(1)(a) of the Act provides as follows:

> 11(1) Subject to any regulations made under this Act, no person, whether as principal or agent, shall —
>
> (a) carry on business as a futures broker ...
> (i) unless such person is a licensed broker under this Act; and (ii) trades in accordance with the business rules and practices of an Exchange or futures market on which trading takes place.
>
> (3) Any person who contravenes subsection (1) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $30,000 or to imprisonment for a term not exceeding 3 years or to both.

Section 14 gives the Monetary Authority of Singapore ('the MAS') the discretion to grant or renew a broker's licence, exercisable by reference to the financial condition and good character of the applicant to safeguard the interest of members of the public who buy and sell futures in SIMEX or any other authorized Exchange. Section 24 restricts the discretion of the MAS to grant a licence where the applicant cannot meet the minimum financial requirements prescribed by the MAS or the approved Exchange.

In my view, the Act clearly prohibits an unlicensed broker from entering into a brokerage contract for futures. Such contracts are not only distinctive, but they are the essence of the business concerned. However, counsel for the defendants contended that s 22 of the Act carried the implication that transactions entered into by a broker without a licence were valid and enforceable. Section 22 provides as follows:

> (1) A person whose licence is revoked under section 20 or revoked or suspended under section 21 shall, for the purpose of this Part, be deemed not to be licensed from the date that the Authority revokes or suspends the licence, as the case may be.
> (2) A revocation or suspension of a licence of a person shall not operate so as to —
>
> (a) avoid or affect any agreement, transaction or arrangement relating to the trading in futures contracts entered into by such person, whether the agreement, transaction or arrangement was entered into before or after the revocation or suspension of the licence; or
> (b) affect any right, obligation or liability arising under any such agreement, transaction or arrangement.

I did not accept this argument. I agreed with counsel for the plaintiff that s 22 is intended to apply only to a situation where an existing licence is revoked or suspended, and not a case where the broker does not have a licence in the first place. Section 22 specifically refers to the effect of a revocation or suspension on contracts entered into before or after the date of revocation or suspension. It deals with a special situation of revocation or suspension. By implication, a situation where a broker does not have a licence at inception should have the opposite consequence. If not, the legal effect is to be determined by established principles of law.

On the evidence, the second defendants were carrying on the business of a futures broker in Singapore without a licence, through the first defendants. Accordingly, the contracts which they had put through for TCK in Singapore were all illegal and all moneys due thereunder were irrecoverable.

With respect to the issue of the recoverability of the shares, counsel for the plaintiff submitted that the shares were recoverable as the plaintiff did not know that TCK's transactions were illegal. Counsel for the defendants merely contended that leave to defend on this issue should be given. Neither counsel cited any authority.

In my view, the shares were recoverable on a number of grounds. Firstly, the plaintiff, assuming he had consented to the shares being used by TCK as security for his futures dealings with the second defendants, was in the position of a guarantor of the liabilities of TCK to the second defendants to the extent of the values of the shares. The consideration for the security was that the second defendants would carry out the buying and selling orders of TCK. This must imply the carrying out of *lawful* and not *unlawful* orders unless the plaintiff had agreed or accepted otherwise. There was no evidence or any allegation of fact before me that the plaintiff was aware that the transactions when entered into would be illegal or that TCK would be entering into illegal contracts with the second defendants. Accordingly, there was no consideration for the plaintiff's security and the shares must be returned to him.

Secondly, one of the objects of the Act is to protect that class of the public who trade in futures. As there was no allegation that the plaintiff was in pari delicto, he was also entitled to recover the shares on this ground: *Kiriri Cotton Co Ltd* v *Dewani*.[6]

Thirdly, the statutory definition of 'futures broker' includes a person who, in connection with the carrying on of his business of futures trading, accepts securities to margin, guarantee or secure any trades or contracts that may result therefrom. In my view, this definition has the effect of prohibiting an unlicensed broker from taking securities in connection with the soliciting or acceptance of orders for the buying or selling of futures. Accordingly, even if a security interest in the shares could pass to the second defendants, a point which I need not decide, they were not entitled to retain the shares.

For the above reasons, the appeal of the defendants was dismissed with costs.

Appeal dismissed.

Solicitors: *Rajah & Tann; Allen & Gledhill.*

Reported by *S Surenthiraraj*

Re Tang King Kai

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS NO 155 OF 1988
CHAO HICK TIN J
5 FEBRUARY 1991

Legal Profession — Disciplinary proceedings — Disciplinary committee's determination under s 90 of Legal Profession Act (Cap 161, 1985 Ed) — Whether specific words spelt out in s 90 should be used

Administrative Law — Disciplinary committee under Legal Profession Act (Cap 161, 1985 Ed) — Chairman passing away after report submitted — Whether disciplinary committee, without the chairman, can reconvene and make report in proper terms — Whether disciplinary committee can be reconstituted by appointment of new chairman

On 1 April 1987, a disciplinary committee was appointed ('the Committee') under the Legal Profession Act ('the Act') to hear and investigate four charges against one Tang King Kai ('TKK'). The Committee found that in respect of the first and fourth charges that TKK should be reprimanded under s 90(1)(b) of the Act. In respect of the second charge, the Committee found that the negligence of TKK amounted to 'grossly improper conduct in the discharge of his profession and duty within the meaning of s 80(2)(b)'. In respect of the third charge, the Committee found that 'TKK's conduct comes within s 80(2)(b) of the Act and he should be dealt with accordingly'.

Under s 90(1) a disciplinary committee is required to determine whether there was cause of sufficient gravity for disciplinary action under s 80 and if not, whether a solicitor should be reprimanded. Following this, the Law Society applied for and obtained an order that TKK should show cause as to why he should not be dealt with under s 80 of the Act. In this application, the Law Society applied for an order, inter alia, to stay the previous order.

The issue was whether the findings of the Committee in respect of the second and third charges amounted to a finding that there was cause of sufficient gravity for disciplinary action under s 80 of the Act. The issues argued before the court were therefore as follows:

(1) Must there be an express reference in the report in terms of the wording of s 90(1)(c) before a matter may be proceeded with further under s 80 of the Act?
(2) If so, could the Committee reconvene and make a report in the proper terms in spite of the fact that the chairman of the committee had passed away?
(3) If the answer to (2) is in the negative, could the Committee be reconstituted by appointment of a new chairman who, together with existing members, proceed to make a report in the proper terms?

Held, dismissing the application:

(1) A disciplinary committee has a duty to make the appropriate determination under s 90(1) of the Act. A proper determination may be made even if the specific words spelt out in s 90(1)(c) were not used, as long as the meaning of the Committee's determination is clear.

(2) In relation to the second charge, the fact that the Committee found TKK guilty of grossly improper conduct within the meaning of s 80(2)(b) must necessarily mean that the matter is of a gravity that warrants the striking off the roll